

AIR COMMAND AND STAFF COLLEGE

AIR UNIVERSITY

**WHOSE RULE? WHOSE LAW?  
FILTERING AMERICA OUT OF THE RULE OF LAW MISSION  
IN IRAQ**

by

Jeffrey G. Palomino, Major, USAF

A Research Report Submitted to the Faculty

In Partial Fulfillment of the Graduation Requirements

Advisor: Colonel Brett E. Morris

Maxwell Air Force Base, Alabama

December 2010

Report Documentation Page			Form Approved OMB No. 0704-0188		
Public reporting burden for the collection of information is estimated to average 1 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to a penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.					
1. REPORT DATE <b>01 DEC 2010</b>		2. REPORT TYPE		3. DATES COVERED <b>00-00-2010 to 00-00-2010</b>	
4. TITLE AND SUBTITLE <b>WHOSE RULE? WHOSE LAW? FILTERING AMERICA OUT OF THE RULE OF LAW MISSION IN IRAQ</b>			5a. CONTRACT NUMBER		
			5b. GRANT NUMBER		
			5c. PROGRAM ELEMENT NUMBER		
6. AUTHOR(S)			5d. PROJECT NUMBER		
			5e. TASK NUMBER		
			5f. WORK UNIT NUMBER		
7. PERFORMING ORGANIZATION NAME(S) AND ADDRESS(ES) <b>Air Force Institute of Technology, 2950 Hobson Way, WPAFB, OH, 45433-7765</b>			8. PERFORMING ORGANIZATION REPORT NUMBER		
9. SPONSORING/MONITORING AGENCY NAME(S) AND ADDRESS(ES)			10. SPONSOR/MONITOR'S ACRONYM(S)		
			11. SPONSOR/MONITOR'S REPORT NUMBER(S)		
12. DISTRIBUTION/AVAILABILITY STATEMENT <b>Approved for public release; distribution unlimited</b>					
13. SUPPLEMENTARY NOTES					
14. ABSTRACT <b>Examines coalition rule of law initiatives in Iraq and contrasts them with Arabic and Islamic cultural norms.</b>					
15. SUBJECT TERMS					
16. SECURITY CLASSIFICATION OF:			17. LIMITATION OF ABSTRACT <b>Same as Report (SAR)</b>	18. NUMBER OF PAGES <b>14</b>	19a. NAME OF RESPONSIBLE PERSON
a. REPORT <b>unclassified</b>	b. ABSTRACT <b>unclassified</b>	c. THIS PAGE <b>unclassified</b>			

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In June 2003, Dr. Khaled Abou El Fadl testified before the United States Senate Judiciary Committee. In hearings titled “Constitutionalism, Human Rights, and the Rule of Law in Iraq,” El Fadl, the Omar and Azmeralda Alfi Distinguished Professor in Islamic Law at the UCLA School of Law, warned: “It is important that the United States not contribute to a situation in which Iraq becomes, by our decree, artificially alienated from its context. If Iraq’s distinctive Muslim and Arab character is artificially diluted, and its policies become a replica of American preferences and policies, this will only confirm the status of Iraq as a country occupied by an alien power.”<sup>1</sup> Although disregarded during the first four years of Operation Iraqi Freedom (OIF), by the spring of 2007 El Fadl’s words about keeping Iraq in context would become the assumption underlying a revived counterinsurgency (COIN) strategy in Multi-National Force – Iraq (MNF-I).<sup>2</sup> In COIN operations, “Victory is achieved when the populace consents to the government’s legitimacy and stops actively and passively supporting the insurgency.”<sup>3</sup> To achieve this end state, the government must be something the people recognize. This requires two things of the counterinsurgent: First, take action consistent with host nation culture and society and, second, avoid doing what clashes. Stated another way, “Successful conduct of COIN operations depends on thoroughly understanding the society and culture within which they are being conducted.”<sup>4</sup>

In COIN operations, the government includes not only political or legislative institutions, but also the array of public and administrative bureaucracies the populace relies on in daily life. One critical component of this is rule of law. In fact, “Establishing the rule of law is a key goal and end state in COIN.”<sup>5</sup> When the government respects and enforces laws and when the populace views the legal system as working, the government is viewed as legitimate and insurgents as law breakers.<sup>6</sup> In contrast, lawlessness, disregard for laws, or an impotent legal

system demoralizes the populace, delegitimizes the government, and encourages support for the insurgency.<sup>7</sup> Like other COIN operations, rule of law is only successful when those that engage in it understand “what is culturally acceptable for the developing nation.”<sup>8</sup> Many OIF rule of law initiatives have ignored this premise and imposed an American rule of law on Iraq that has clashed with Iraqi culture and stripped Iraqi jurisprudence of its legal context. This paper presents examples along three lines: practice, procedure, and professionalism. First, the paper frames these by defining rule of law and juxtaposing that definition with a more subtly American-centric one. Second, it describes failed rule of law initiatives and explains the departure from Iraqi culture or practice. Finally, the paper makes observations to help future practitioners engage in more strategic rule of law operations.

The term “rule of law” is difficult to define. In fact, practitioners in the field “often express contradictory thoughts” on what rule of law means.<sup>9</sup> Nevertheless, US Army Field Manual 3-07, *Stability Operations*, provides a broad definition of rule of law that mirrors the United Nations’ definition.<sup>10</sup> The rule of law is “A principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and that are consistent with international human rights principles.”<sup>11</sup> The manual expounds on this definition, breaking it into seven parts.<sup>12</sup> Although this definition is culturally neutral, the manual reminds that “effective” rule of law “accounts for the customs, culture, and ethnicity of the local populace.”<sup>13</sup>

In 2008, the US Agency for International Development (USAID) gave its own definition of rule of law that stands in contrast to this “fill-in-the blank” one. A vocal interagency partner, USAID has considerable influence in rule of law missions in developing countries including

Iraq. In its rule of law guide for USAID officers, USAID agreed up front with the above DOD definition of rule of law.<sup>14</sup> Later in the guide, USAID elaborated on the definition. To USAID, the rule of law isn't just a principle, it "is also about quality – well-prepared defense attorneys, changes in the legal framework to protect women, better information, a computer terminal at the courthouse entrance that allows litigants or family members to see what is happening in their case, a more diverse and client-oriented court staff and more convenient hours of operation."<sup>15</sup> Although many Americans agree with this definition, it's doubtful many Iraqis would. This is so because the definition templates an American ideal onto rule of law divorcing it from Iraqi cultural, societal, and legal norms. This illustrates the biases many Americans bring to the rule of law mission.

Unfortunately, American-centric definitions have frequently formed implicit and explicit lines of operation in the US rule of law mission in Iraq. In practice, one example of this is rule of law initiatives that press for the equality of Iraqi women. Most US practitioners are instinctively wired to include liberation of Iraqi women into rule of law efforts. The American cultural bias for this is obvious; the civil rights of women enjoy a proud heritage in our country, and many women serve proudly in our military. Initiatives of these types include legislation implementing western-style rights for Iraqi women or employment reforms making women equal to Iraqi men. On a subtle level, they can include cultural missteps such as American males speaking comfortably with Iraqi women or US military females being overly demonstrative in showing their equality to Iraqis. The most egregious example of this came in September 2003 when a Coalition Provision Authority (CPA) and military governor proposed to swear in a female judge to an Iraqi court in Najaf, the holiest city to Shiite Muslims.<sup>16</sup> Only when local

citizens protested the ceremony and near mob violence ensued did the battalion commander intervene and call the event off.<sup>17</sup>

The push to appoint a female judge was a glaring departure from Iraqi culture. Although there is dispute as to the role of women in Islam and despite the fact that different Arabic cultures view women differently, several facts are clear. First, in the Qur'an "women are equal in faith," but it is "disingenuous to claim that the Qur'an accords women equal place with men in earthly society."<sup>18</sup> In fact, the Qur'an takes for granted that "men lead the community, fight, hunt, preach, and make law. Women raise children and tend to domestic duties."<sup>19</sup> Moreover, Arabic culture has "established strict codes of male-female conduct" often segregating the sexes in education and in religious practices such as prayer.<sup>20</sup> Lastly, roles of women hold powerful influences associated with honor and shame in Arabic culture where the "honour (sic) of any kinship group resides in the sexual conduct of its womenfolk."<sup>21</sup> Therefore, imposing western views of women not only risks riots, but greatly offends already hypersensitive Iraqi cultural taboos.

Similar societal missteps have occurred in the area of procedure. In the book *Cobra II*, Michael R. Gordon and General Bernard E. Trainor argue that, "From the start, American political objectives were bold and extraordinarily ambitious" in Iraq.<sup>22</sup> This was surprisingly evident in the rule of law mission. In May of 2003, the US Department of Justice sent four teams to Iraq to assist the newly established CPA in establishing the rule of law in Iraq.<sup>23</sup> The advisory group included a 13 member judicial assessment team of judges, prosecutors, public defenders, and legal administrators.<sup>24</sup> The teams stayed in Iraq for only about two weeks and afterwards completed a report to the CPA recommending changes to the Iraqi legal system.<sup>25</sup> Following the report, on 18 June 2003 the CPA issued a memorandum to the Iraqi people

instituting sweeping procedural reforms.<sup>26</sup> For example, all Iraqi criminal defendants would now be afforded the right to a defense attorney at the initial appearance before an Iraqi magistrate rather than just at trial. In addition, defendants were also given the right to remain silent and coalition forces would be required to give “right to remain silent” type warnings to Iraqi criminal suspects.<sup>27</sup> While some Iraqi judges ignored these reforms others took them to almost farcical extremes.<sup>28</sup> For example, in one case an Iraqi judge refused to accept a proffered guilty plea from unrepresented defendant despite the defendant fully confessing his guilt and corresponding desire to be punished.<sup>29</sup> The judge even “admonished the accused he would be in even more trouble if he refused to get a lawyer because the coalition required every accused to have a lawyer whether he wanted one or not.”<sup>30</sup>

These procedural reforms clashed with previous Iraqi jurisprudence in two ways. First, the Iraqi judicial system is an inquisitorial judicial system as opposed to the American accusatory system.<sup>31</sup> Unlike the American system where prosecution and defense attorneys are primary, in the inquisitorial system the Investigative Judge (IJ) plays the central role.<sup>32</sup> The IJ coordinates with the police, reviews evidence, questions the witnesses in the case, perfects the case, and ultimately decides if there’s “sufficiency of evidence” to proceed to a trial.<sup>33</sup> This reduces the need for the trial judges to review the evidence, marginalizes the roles of attorneys in the process, and leads to trials that last sometimes only 15 or 20 minutes.<sup>34</sup> Second, the right to remain silent had never existed in Iraqi law prior to the CPA’s June 2003 memorandum.<sup>35</sup> In fact, the Iraqi courts rely heavily on confessions and have strong cultural biases towards hearing from the accused.<sup>36</sup> This comes not only from procedure but also from Islam, which “Unlike many other religions familiar to American non-Muslims . . . inserts itself into the body politic far more aggressively than other religions.”<sup>37</sup> For example, unlike the modern American witness



who no longer has to place his hand on the Bible and testifies in accordance with his conscience, Iraqi witnesses have to swear on the Qur'an before giving testimony. In fact, the Qur'an is usually ready, already sitting out on the IJ's desk. Therefore, not only does the inquisitorial system differ from our system, but the preference of needing to hear from someone swearing on the Qur'an looms large in Iraqi courts.

Rule of law initiatives have also failed in areas of professionalism. Most would agree in a judge driven system like Iraq's "Coalition forces' ability to effectively conduct rule of law operations largely depends on the degree of influence they have with the Iraqi judiciary."<sup>38</sup> To this end, many rule of law efforts have focused exclusively on training Iraqi judges. For example, early in OIF legal teams sponsored training programs for judges on subjects such as due process, suspect rights, Iraqi criminal procedure, human rights, and women's rights.<sup>39</sup> This trend continues today with US forces training Iraqi judges to accept forensic evidence (e.g., blood evidence and DNA) and to reduce their long-held preferences for eyewitness testimony.<sup>40</sup> In addition, many rule of law initiatives have focused on judicial efficiency, pushing judges to work more hours and do business quicker. The running subtext of this, sometimes said explicitly, is that Iraqi judges are lazy. This subtext often evidences itself in real ways by coalition forces having terse or blunt interactions with Iraqi judges, urging them to take initiative and make independent decisions.

These professionalism initiatives and the corresponding attitudes they generate have a high risk of impeding on sensitive Arabic cultural mores. First, concepts of "dignity and respect" are "core values in Iraqi culture."<sup>41</sup> This is all the more when it comes to the educated Iraqi judiciary who expect the respect and honor equal to their position.<sup>42</sup> Iraqis are extremely "status conscious."<sup>43</sup> The significance of this is twofold. First, Iraqi judges may perceive the

“training” as condescending, especially when conducted by women or low-ranking military members.<sup>44</sup> Second, Iraqi judges are also generally reluctant to take initiative for fear of showing disrespect. This is especially true if it means operating independently of their superiors. Outside the notion of respect, Arabs generally tend to be suspicious of strangers.<sup>45</sup> This is exacerbated by training programs that push American rights or radical changes to Iraqi jurisprudence that seem more at place in US television shows. Some Iraqi judges are extremely wary of such initiatives, rightly “seeing them as an attempt to train ‘western’ or ‘American’ values.”<sup>46</sup> Finally, pushes for efficiency may conflict with Arab work habits, which vary considerably from the United States.<sup>47</sup> For example, Iraqis may not begin their workday until mid-morning and may go home in the middle of the afternoon.<sup>48</sup> Most Iraqi judges enjoy drinking tea, smoking, and discussing current events before discussing business.<sup>49</sup> This is consistent with broader Arabic culture where people are expected to take the time to get to know someone before they are accepted.<sup>50</sup> Therefore, rule of law efforts that spread the gospel of the efficient American lawyer and his billable hours are likely to have failed from the start.

These three lines of failed rule of law initiatives lead to three observations. First, most rule of law practitioners do not understand the seismic shift of strategy that occurred in US thinking towards COIN operations in Iraq beginning in 2007. One of the key changes Gen David Petraeus made when he took command of MNF-I was, what Thomas E. Ricks calls in his book *The Gamble*, a “quiet ratcheting down” of OIF’s original strategic goals.<sup>51</sup> When Gen Petraeus took command of MNF-I in 2007 the command strategy let go of the idealistic view that Iraq was going to become a democracy.<sup>52</sup> Similarly, human rights were no longer a long-term US goal.<sup>53</sup> Instead, a stable Iraq became the only strategic objective.<sup>54</sup> If the military mission in Iraq has already abandoned lofty democratic ideals in favor of something more realistic it begs

the question of why rule of law efforts have not followed suit. Iraq can be stable without female judges, a robust defense bar, or judges accepting fingerprint evidence. Second, rule of law initiatives should build not replace Iraqi capacities.<sup>55</sup> Building capacity means the Iraqis do it themselves whereas replacing it means substituting something foreign to the Iraqi system. Building capacity requires the full tool kit of cultural awareness that is all too often lacking. Third, to do rule of law effectively in Iraq requires more than just cultural sensitivity; it requires an active filtering out of all that's American in rule of law. The distinction is important. The former is passive while the latter is active. One can be culturally sensitive and, at the same time, still think the American way of doing things is necessary. The pull toward this is great and requires a deliberate choice to make Iraq's system work rather than the easier default of making Iraq's system work like ours.

At the conclusion of his testimony to the US Senate El Fadl said, "In my view we cannot afford to deal with Iraq as vanquishing victors, and expect the Iraqis to mold themselves after our image."<sup>56</sup> Unfortunately, the rule of law mission in Iraq has all too often done just that, unnecessarily imposing American ideals onto the Iraqi legal system in terms of practice, procedure, and professionalism. Despite this, Iraq and its legal system still have an opportunity to define themselves.<sup>57</sup> Ultimately, "rule of law is not Western, European, or American" but "available to all societies."<sup>58</sup> If America is to succeed in Iraq, it must look to this universal definition of rule of law while, at the same time, allowing the Iraqis to redefine it in words they understand.<sup>59</sup>

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<sup>1</sup> Senate, *Testimony of Dr. Khaled Abou El Fadl prepared for Hearings on Constitutionalism, Human Rights, and the Rule of Law in Iraq before the Committee on the Judiciary*, 108<sup>th</sup> Cong., 2d sess., 2003, 8, [http://judiciary.senate.gov/hearings/testimony.cfm?id=826&wit\\_id=2348](http://judiciary.senate.gov/hearings/testimony.cfm?id=826&wit_id=2348).

<sup>2</sup> Thomas Ricks, *The Gamble* (New York, NY: The Penguin Press, 2009), 162-63.

<sup>3</sup> Field Manual (FM) 3-24, *Counterinsurgency*, 15 December 2006, 1-3.

<sup>4</sup> Ibid, 1-22.

<sup>5</sup> Army Field Manual (FM) 3-24, *Counterinsurgency*, 15 December 2006, D-8.

<sup>6</sup> The Judge Advocate General's School, *Air Force Operations and the Law: A Guide for Air, Space, & Cyber Forces* (Maxwell AFB, AL: The Judge Advocate General's School, 2009), 337.

<sup>7</sup> Ibid.

<sup>8</sup> The Judge Advocate General's Legal Center & School, U.S. Army and Center for Law and Military Operations, *Rule of Law Handbook: A Practitioner's Guide for Judge Advocates* (Charlottesville, VA: Center for Law and Military Operations), 22.

<sup>9</sup> Thomas Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge," *Carnegie Endowment for International Peace Working Papers* (Washington, DC: Carnegie Endowment for International Peace), 5, <http://www.carnegieendowment.org/files/wp34.pdf>.

<sup>10</sup> Judge Advocate General's Legal Center & School, *Rule of Law Handbook*, 5.

<sup>11</sup> Army Field Manual (FM) 3-07, *Stability Operations*, 6 October 2008, 1-9.

<sup>12</sup> Ibid. (The seven effects of rule of law in a society are (1) The state monopolizes the use of force in the resolution of disputes, (2) Individuals are secure in their persons and property, (3) The state is bound by law and does not act arbitrarily, (4) The law can be readily determined and is stable enough to allow individuals to plan their affairs, (5) Individuals have meaningful access to an effective and impartial justice system, (6) The state protects basic human rights and fundamental freedoms, and (7) Individuals rely on the existence of justice institutions and the content of law in the conduct of their daily lives.)

<sup>13</sup> Ibid.

<sup>14</sup> United States Agency for International Development, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* (August 2009), 5.

<sup>15</sup> Ibid., 10.

<sup>16</sup> The Judge Advocate General's Legal Center & School, U.S. Army and Center for Law and Military Operations, *Forged in the Fire: Legal Lessons Learned During Military Operations 1994-2006* (Charlottesville, VA: Center for Law and Military Operations), 22.

<sup>17</sup> Ibid.

<sup>18</sup> Thomas W. Lippman, *Understanding Islam: An Introduction to the Muslim World* (New York, NY: Penguin Putnam, 2002), 94-95.

<sup>19</sup> Ibid., 95.

<sup>20</sup> William G. Baker. *The Cultural Heritage of Arabs, Islam, and the Middle East* (Dallas, TX: Brown Books, 2003), 81.

<sup>21</sup> Suha Omar, "Women: Honour, Shame and Dictatorship," in *Iraq since the Gulf War Prospects for Democracy*, ed. Franz Hazelton (London, UK: Zed Books, 1994), 61.

<sup>22</sup> Michael R. Gordon and General Bernard E. Trainor, *Cobra II* (New York, NY: Pantheon Books, 2006), 497.

<sup>23</sup> The Judge Advocate General's Legal Center & School, U.S. Army and Center for Law and Military Operations, *Legal Lessons Learned From Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003 – 30 June 2004)* (Charlottesville, VA: Center for Law and Military Operations), 22.

<sup>24</sup> MAJ Leonard J. Law, "Rule of Law in Iraq: Transitional Justice Under Occupation," (Monograph presented to the School for Advanced Military Studies, Fort Leavenworth, KS, May 2006), 15.

<sup>25</sup> Judge Advocate General's Legal Center & School, *Lessons Learned From Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003 – 30 June 2004)*, 23.

<sup>26</sup> Ibid., 29.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid., 29.

<sup>29</sup> Ibid., 47.

<sup>30</sup> Ibid.

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- <sup>31</sup> Major James W. Annexstad, “The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants – A Look at the Task Force 134 Process and the Future of Detainee Prosecutions,” *The Army Lawyer* (July 2007), 73.
- <sup>32</sup> *Ibid.*
- <sup>33</sup> Judge Advocate General’s Legal Center & School, *Rule of Law Handbook*, 255.
- <sup>34</sup> *Ibid.*
- <sup>35</sup> Judge Advocate General’s Legal Center & School, *Legal Lessons Learned From Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003 – 30 June 2004)*, 29.
- <sup>36</sup> Annexstad, “The Detention and Prosecution of Insurgents,” 78.
- <sup>37</sup> Lt Col Vincent Foulk, “Legal Perspectives for Civil-Military Operations in Islamic Nations,” *Military Review* (January-February 2002), 19.
- <sup>38</sup> Judge Advocate General’s Legal Center & School, *Rule of Law Handbook*, 258.
- <sup>39</sup> Judge Advocate General’s Legal Center & School, *Legal Lessons Learned From Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003 – 30 June 2004)*, 49-50.
- <sup>40</sup> Spc. Josh LeCappelain, “Iraqi Legal System Continues to Advance,” *Multi-National Force – Iraq*, 4 February 2009, [http://www.mnf-iraq.com/index.php?option=com\\_content&task=view&id=25260&Itemid=128](http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=25260&Itemid=128).
- <sup>41</sup> Ricks, *The Gamble*, 213.
- <sup>42</sup> Judge Advocate General’s Legal Center & School, *Rule of Law Handbook*, 258.
- <sup>43</sup> *Ibid.*, 260.
- <sup>44</sup> *Ibid.*
- <sup>45</sup> Baker, 17.
- <sup>46</sup> The Judge Advocate General’s Legal Center & School, *Legal Lessons Learned From Afghanistan and Iraq: Volume II, Full Spectrum Operations (2 May 2003 – 30 June 2004)*, 50.
- <sup>47</sup> Baker, *Cultural Heritage of Arabs, Islam, and the Middle East*, 70.
- <sup>48</sup> *Ibid.*
- <sup>49</sup> Judge Advocate General’s Legal Center & School, *Rule of Law Handbook*, 261.
- <sup>50</sup> Baker, *Cultural Heritage of Arabs, Islam, and the Middle East*, 69.
- <sup>51</sup> Ricks, *The Gamble*, 165.
- <sup>52</sup> *Ibid.*, 164.
- <sup>53</sup> *Ibid.*, 316.
- <sup>54</sup> *Ibid.*
- <sup>55</sup> Stewart Patrick, “An Integrated Approach to Preventing and Responding to State Failure: Recent Progress and Remaining Challenges,” Eisenhower National Security Series Conference on Stability Operations (U.S. Army, 2006), 7, [http://www.cgdev.org/doc/commentary/speeches/4\\_19\\_06ENSS.pdf](http://www.cgdev.org/doc/commentary/speeches/4_19_06ENSS.pdf).
- <sup>56</sup> US Senate, *Testimony of Dr. Khaled Abou El Fadl*, 9.
- <sup>57</sup> *Ibid.*, 8-9.
- <sup>58</sup> Judge Advocate General’s Legal Center & School, *Rule of Law Handbook*, 223.
- <sup>59</sup> *Ibid.*

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